United Food and Commercial Workers Union Local 1439, Chartered by United Food and Commercial Workers International Union, AFL–CIO, CLC *and* Layman's Inc., d/b/a Layman's Market. Cases 19–CB–4079 and 19–CB–4265

3 February 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 27 April 1982 Administrative Law Judge Jay R. Pollack issued the attached decision. The Respondent and the Charging Party filed exceptions and supporting briefs, and the General Counsel filed a brief in support of the judge's Decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.

The judge found, and we agree, that the Respondent violated Section 8(b)(3) of the Act by refusing to meet with the Employer's representatives from March until July 1981,[2] for the purpose of negotiating collective-bargaining agreements for the Employer's meat and grocery department units. The judge also found, however, that the Respondent violated Section 8(b)(3) of the Act by refusing to furnish information to the Employer pertaining to existing trust funds covering the employees whose continuing participation in the funds was proposed by the Respondent in the collective-bargaining negotiations. The judge reasoned that the requested information was relevant to the Employer's bargaining posture in the collective-bargaining negotiations and that, pursuant to *Hospital Employees (Sinai Hospital)*,[3] the Respondent had an affirmative duty to request directly from the trust administrator that this information be provided to the Employer rather than merely direct the Employer to write the trust administrator for this information. We find merit in theRespondent's exception to this finding.

On 24 August the parties declared themselves at an impasse over negotiations for new collective-bargaining agreements concerning the grocery and meat department units. On 27 August Gary Lofland, the Employer's attorney, wrote the Respondent's secretary-treasurer, Don Zachary, requesting information including, inter alia, financial reports for the health and pension plans the Respondent was seeking.[4] On 28 August Lofland wrote Zachary asking for "names of employees who have vested pensions, and names, credits and amounts of credits of other employees." On 11 September, Lofland wrote Zachary asking for ". . . the current amount of unfunded liability of the pension plan for the Employer."[5]

Sean Harrigan, the Respondent's president, was a trustee of three of the four funds.[6] As a trustee, Harrigan was provided with information by the administrator at each trustee meeting which outlined the trust's financial condition. Nevertheless, on 17 September, pursuant to Harrigan's orders, Zachary responded to Lofland's letters by stating that all pertinent information requested could be obtained by contacting directly the administrator of the four funds, Steve Sherman. The letter also included Sherman's address and telephone number.

Two months later, 19 November, Lofland wrote Sherman and requested the same information that he had requested from the Respondent in his 28 August and 11 September letters. By letter dated 8 December, the administrator responded to Lofland's inquiries about the unfunded liability of the Retail Clerks Pension Trust. The letter identified the entire fund's unfunded vested liability as of 30 September 1979 and 30 September 1980 and stated that the administrator would calculate the Employer's withdrawal liability for a $40 fee.[7] On 10 December,[8] the administrator wrote to Lofland concerning the Meat Industry Pension Trust. The letter stated that because the fund's assets exceeded its liabilities no withdrawal liability would be imposed on any employer who withdrew from the Trust. After another 2 months had passed, on 15 February 1982, Lofland wrote the administrator again requesting essentially the same information requested in his 19 November letter, plus the Employer's current withdrawal liability and the years

[1] We correct the following inadvertent error in the judge's decision: at sec. III,B, par. 1, the grocery department unit's collective-bargaining agreement expired in April 1980, not March 1980.

[2] All dates are in 1981 unless otherwise noted.

[3] 248 NLRB 631 (1980).

[4] There were four health and pension plans involved herein. The Respondent proposed continuation of the Retail Clerks Health and Welfare Trust and the Retail Clerks Pension Trust for employees in the Employer's grocery department unit, and the Washington Meat Industry Welfare Trust and the Washington Meat Industry Pension Trust for employees in the Employer's meat department unit.

[5] Lofland requested this information to determine the solvency of the Respondent's plans and whether it was economically feasible for the Employer to withdraw from the pension funds and push for the Employer's own independent pension plan during negotiations.

[6] Harrigan was not a trustee of the Washington Meat Industry Pension Trust. He became a trustee of the Meat Industry Welfare Trust in July 1980 and of the Retail Clerks funds in February or March 1981.

[7] It was common practice for the fund to charge for these detailed computations.

[8] The judge inadvertently stated that this letter was written on 8 December.

of vested service of employees whose pensions had vested. Having received no response, on 3 March 1982, Lofland wrote the administrator seeking the requested information or an explanation why it was being withheld. On 11 March 1982 the administrator sent separate letters for each fund. In these letters, the administrator answered all of Lofland's requests except for the current unfunded liability (which had been answered previously in his 8 and 10 December letters) and the Employer's current withdrawal liability, which the administrator had previously indicated would be computed for a fee of $40.

As stated previously, the judge found that the Respondent had an affirmative duty to demand that the trust administrator provide the Employer with the requested information and its failure to do so constituted a violation of Section 8(b)(3) of the Act. In so finding, the judge inferred from the circumstances that Harrigan's intent in asking the Employer to make its request for information directly to the trust administrator was to delay delivery of the information to the Employer, a tactic consistent with Harrigan's other dilatory actions found herein to violate Section 8(b)(3) of the Act. Moreover, the judge found that the Employer did not have the same access to information from the funds as did the Union since Harrigan was a trustee of three out of four funds under discussion and the Employer had no similar representative.

In *NLRB v. Amax Coal Co.*,[9] the Supreme Court held that trustees of jointly administered trust funds are not agents of their respective parties but are fiduciaries "whose duty to the trust beneficiaries must overcome any loyalty to the interest of the party that appointed [them]." In *Sinai Hospital*, supra at 633, relied on by the judge here, a union's collective-bargaining representative, who was also trustee of a health and welfare trust fund from which the employer with whom the union was engaged in collective bargaining requested relevant information, collaborated with the other union trustees to block the employer's information request. We held in that case that the union representative violated Section 8(b)(3) of the Act as a trustee of the fund by intentionally preventing the employer's access to the requested information and that the union representative thereby violated his "affirmative obligation to make a reasonable effort to obtain the information, or to investigate reasonable alternative means for obtaining it, or to truthfully explain or document the reasons for its unavailability . . . ." Our decision there predated the Court's decision in *Amax*, and therefore our holding in *Sinai* must be modified accordingly. We conclude that our decision in *Sinai* continues to be valid only where a collective-bargaining representative demonstrates that it is in de facto control of a nominally independent trust fund.[10]

That is not the case here, however. First, the union trustee took no action to prevent the Employer from gaining access to the requested information, and indeed cooperated with the Employer to the extent of providing the Employer with the means of obtaining the information sought. Second, while it is true that the trustee possessed information about the fund as a matter of course, he did not possess the specific information which the Employer requested herein. Furthermore, we find no reason for imposing additional burdens on the Union's collective-bargaining representative since he would have had to secure it from the administrator, which the Employer could do equally well, and there is no evidence that the Union's collective-bargaining representative had any more expeditious or effective access to the information than the Employer. Accordingly, we shall dismiss this allegation.

AMENDED CONCLUSIONS OF LAW

Substitute the following for Conclusions of Law 5 and 6 of the judge.

"5. By refusing to meet and confer with the Employer concerning succeeding bargaining agreements during the period from March to July 1981, the Respondent violated Section 8(b)(3) of the Act.

"6. The unfair labor practice of the Respondent as described above affects commerce within the meaning of Section 2(6) and (7) of the Act."

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, United Food and Commercial Workers Union Local 1439, chartered by United Food and Commercial Workers International Union, AFL–CIO, CLC, Spokane, Washington, its officers, agents, and representatives, shall take the action set forth in the Order as modified.

1. Delete paragraph 1(b) and reletter the subsequent paragraphs accordingly.

2. Delete paragraph 2(a) and reletter the subsequent paragraphs accordingly.

3. Substitute the attached notice for that of the administrative law judge.

[9] 453 U.S. 322 (1981).

[10] For the same reasons, however, *Teamsters Local 959 (Frontier Transportation Co.)*, 244 NLRB 19 (1979), is hereby overruled.

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

WE WILL NOT refuse to meet and confer with Layman's, Inc., d/b/a Layman's Market, for purposes of negotiating succeeding collective-bargaining agreements in both the meat and grocery department units described below.

WE WILL NOT in any like or related manner refuse to bargain collectively with Layman's Market.

The appropriate bargaining units are:

1. The meat department unit:

All journeymen meat cutters, meat wrappers and apprentice meat cutters, excluding guards and supervisory employees within the meaning of Section 2(11) of the Act.

2. The grocery department unit:

All employees of Layman's Market handling or selling merchandise, excluding meat department employees, guards, and supervisory employees within the meaning of Section 2(11) of the Act.

UNITED FOOD AND COMMERCIAL WORKERS UNION LOCAL 1439, CHARTERED BY UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, CLC

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge: I heard these cases in trial at Yakima, Washington, on March 16, 1982. Pursuant to a charge filed in Case 19-CB-4079 against United Food and Commercial Workers Union Local 1439, chartered by United Food and Commercial Workers International Union, AFL-CIO, CLC (the Respondent), on March 19, 1981, by Layman's, Inc., d/b/a Layman's Market (the Employer), the Acting Regional Director for Region 19 of the National Labor Relations Board issued a complaint and notice of hearing on May 12, 1981. On September 3, 1981, the Employer filed a charge in Case 19-CB-4265. Thereafter on November 12, the Acting Regional Director issued an order consolidating cases, and consolidated complaint and notice of hearing. The consolidated complaint was again amended on March 3, 1982. The consolidated complaint, as amended at the hearing, alleges that the Respondent committed certain violations of Section 8(b)(3) of the National Labor Relations Act.

All parties were given full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Based on the entire record, and from my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT AND CONCLUSIONS

I. JURISDICTION

The Employer is a Washington corporation, with its principal place of business located in Union Gap, Washington, where it is engaged in the operation of a retail grocery store. During the 12 months preceding issuance of the complaint, the Employer had gross sales in excess of $500,000 and purchased and received goods valued in excess of $50,000 which originated from outside the State of Washington. Accordingly, the Employer is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the answer admits, and I find that the Respondent is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background and Issues*

The Employer has had a series of collective-bargaining agreements with predecessor unions of the Respondent since 1960, covering its grocery department employees and its meat department employees. The last agreement covering the grocery department employees, between the Respondent and Retail Clerks Local 1612, was effective by its terms from April 15, 1977, until April 15, 1980. The last agreement covering the meat department employees, between the Respondent and Meatcutters Union Local 529, was effective by its terms from October 1, 1977, to October 5, 1980. On March 18, 1980, the Respondent merged with Retail Clerks Local 1612 and Meatcutters Union Local 529 and became the collective-bargaining representative for the Employer's employees in both the grocery and meat department units.[1]

The instant case arises out of negotiations for succeeding agreements to the contracts which expired in 1980. The complaint alleges that the Respondent violated Section 8(b)(3) of the Act by refusing to bargain with the Employer in either the grocery or meat department units during the time period of March through July 1981. Further the General Counsel alleges that the Respondent violated Section 8(b)(3) by refusing to furnish the Employer certain information, pertaining to the trust funds provided for in the agreements, allegedly necessary and

[1] The parties stipulated that the Union is the exclusive representative, within the meaning of Sec. 9(a), of the employees in each of the following units appropriate for purposes of collective bargaining:

1. The meat department unit:

All journeymen meat cutters, meat wrappers and apprentice meatcutters, excluding guards and supervisory employees within the meaning of Section 2(11) of the Act.

2. The grocery department unit:

All employees of Layman's Market handling or selling merchandise, excluding meat department employees, guards, and supervisory employees within the meaning of Section 2(11) of the Act.

relevant for collective-bargaining purposes. The Respondent denies the commission of any unfair labor practices. Further, the Respondent alleges that the information it refused to furnish the Employer was equally available to the Employer from the trust funds.

B. *The Bargaining*

As discussed above, the collective-bargaining agreement covering the Employer's grocery employees unit expired in March 1980. In April 1980, Charles Fields, a business representative for the Respondent, gave Grace Layman, the Employer's secretary-treasurer, a proposed interim agreement. The purpose of the interim agreement was that the Employer and the Union agreed that the Employer would execute a contract with the same terms as the collective-bargaining agreement between the Respondent and Allied Employers (a multiemployer bargaining association which represents the major grocery markets in the area), which agreement was still under negotiation. Layman told Fields that she would not sign the interim agreement. Layman further told Fields that she did not believe her small store would live with the terms of the "Allied Agreement." In September 1980, Fields again visited Layman at her store and informed her that the negotiations with Allied were almost wrapped up. Fields gave Layman a copy of Allied's and the Respondent's last offers. On September 24, Fields gave Layman a copy of Allied's last and final offers. The next day, Layman called Fields and asked Fields to set up a meeting with Sean Harrigan, the Respondent's president, to begin negotiations on a contract. Fields said he would see what he could do. Several days later, Fields called Layman and arranged to meet with her on October 10.

On October 10, Fields met with Layman at her store and discussed several concerns raised by Layman about the application of the Allied Agreement to her store. Fields answered Layman's questions by saying, "I'll get with Sean." Layman asked Fields whether or not he was negotiating and Fields answered, "Sean sent me out to see what was bothering you." Layman demanded to speak with Harrigan and Fields answered that he would call Layman back that afternoon. Later that afternoon, Fields called Layman and told her that Harrigan had said that the Respondent would not deviate from the Allied Agreement. Layman told Fields that her store was a "small, little, one-man store" and that Harrigan owed her a response to questions she had raised about the agreement. Fields said he would contact Harrigan for Layman. Shortly thereafter, Harrigan called Layman and asked to meet with her. Harrigan and Layman agreed to meet on October 16.

On October 16, Harrigan, Layman and Stan Layman, Grace's husband, met at a Sambo's restaurant in Yakima, Washington. Layman asked Harrigan questions about the health and welfare and pension programs in the contract. However, Harrigan answered that those areas could not be negotiated. Layman then raised a question about her rules for the conduct of employees handling cash and asked whether the contract could be modified to accommodate her rules. Harrigan answered that disciplinary matters had to be handled by the Respondent. Layman asked whether or not Harrigan was negotiating with her and he answered that it was difficult for him to negotiate with every little store. Layman told Harrigan that, as a small store, she could not live with the Allied Agreement. Harrigan answered that five or six other little stores did. Layman said that she knew that those stores did not closely abide by the contract. Layman said she would only sign a contract that she could live with. At the close of this meeting, Harrigan agreed to look at Layman's rules for employees and Layman said she would mail the rules to Harrigan. Layman mailed a copy of her rules for employee conduct to Harrigan on November 3.

In February 1981, Dick Vaughn, a field representative, delivered a copy of the Allied meat department agreement to Layman. Layman told Vaughn that she would read the agreement but was not going to sign it. Vaughn laughed and said he knew that Layman was not going to sign it. On March 11, Harrigan wrote Layman requesting that she sign a grocery agreement and a meat agreement by March 20, 1981. On March 17, Layman wrote Harrigan requesting that he meet and discuss a new contract. On March 23, Layman again wrote Harrigan requesting that they meet to discuss a new contract. With her March 23 letter Layman enclosed proposed changes for both the grocery and meat agreements. Harrigan did not respond to Layman's March 17 and 23 letters. Rather, on April 9, 1981, the Respondent filed a charge with Region 19 alleging that the Employer had refused to bargain in good faith by refusing to sign agreements identical to the Allied grocery and meat agreements. The Regional Director dismissed the charge and on June 26, 1981, the General Counsel sustained that dismissal. Thereafter on July 9, Harrigan wrote Layman requesting that negotiations commence for new grocery and meat agreements. According to Harrigan, the Respondent did not bargain with the Employer between March and July 1981, because he believed that the Employer had adopted the Allied Agreements by its conduct in abiding by the terms of those agreements.[2]

On August 11, Grace Layman, her husband Stan, son Curt, and attorney Gary Lofland met with Don Zachary, Respondent's secretary-treasurer and Ron Korvink, an International union representative. The parties discussed the Respondent's proposals for the grocery and meat agreements. On August 24, the parties met again and discussed the Employer's proposals. The parties declared themselves at impasse and have not held another negotiation session. Layman sought a mediator from the Federal Mediation and Conciliation Service but, because of the smallness of the unit and that agency's budgetary problem, no mediator has yet been assigned to the matter.

On August 27, 1981, Lofland, on behalf of the Employer, wrote Zachary seeking certain information including, inter alia, "financial reports for 1979, 1980, 1981

[2] The Employer paid the new wage rates contained in the Allied Agreements but did not pay such rates retroactively as required by the Allied Agreements. The Employer also continued to make trust fund payments. However, the record does not indicate whether any increase in payments was made after the Allied Agreements went into effect.

for the Health Plan and Pension you are urging." On August 28, Lofland wrote Zachary asking for "Names of employees who have vested pension [and] names, credits and amounts of credits of other employees." On September 11, Lofland wrote Zachary stating, "Please provide the current amount of unfunded liability of the pension plan for the [Employer]." On September 17, Zachary responded to Lofland's three letters mentioned above. The pertinent portions of the response read as follows:

> . . . The financial reports for both the health plans and pension plans must be requested by you directly from the plans' administrator, Mr. Steve Sherman, Administrator, United Administrators, Inc., 500 Fourth and Battery Building, Seattle, WA 98121, telephone (206) 223-6200. He can provide you with the Retail Clerks Health and Welfare Trust, Retail Clerks Pension Trust, Washington Meat Industry Pension Trust.
>
> . . . The following is in response to your letter of August 28, 1981: The names of vested employees and names, credits, and amounts of credits of other employees must come from your direct request to the administrator of both the Retail Clerks Pension Trust and the Washington Meat Industry Pension Trust, which is Mr. Steve Sherman, address as indicated above.
>
> The following is in response to your letter of September 11, 1981: The current amount of unfunded liability of the pension plans must be obtained by you directly from Mr. Steve Sherman at the above address.

After receiving Zachary's letter on November 19, Lofland wrote the administrator and requested the following information regarding both the Retail Clerks Pension Trust and Meat Industry Pension Trust:

> (1) The names of all current employees of Layman's Market who have vested pensions.
> (2) If employees are not vested, the name and amount of credits those employees have earned.
> (3) The current amount of unfunded liability of Layman's.

On December 8, 1981, the administrator wrote Lofland two letters, one for each trust fund, purporting to answer his request for information. The letter concerning the Retail Clerks Pension Trust indicated the Fund's unfunded liability but did not indicate the Employer's withdrawal liability. The administrator offered to calculate that information for a $40 charge. The letter concerning the Meat Industry Pension Trust indicated that no liability would be imposed on any employer who withdrew from the Trust. On February 15, 1982, Lofland wrote the administrator again requesting the following information:

> (1) Names of all employees of Layman's, Inc. who have vested pensions
> (2) Amount or years of vested interest
> (3) If employees are not vested, the names and credits those employees have earned
> (4) The current unfunded liability of the trust
> (5) The employer's current withdrawal liability

On March 3, Lofland, having received no response to his letter of February 15, again wrote the administrator seeking the above information or an explanation for the refusal to provide the same. On March 11, the administrator sent two letters, one for each Fund, answering items (1), (2), and (3) of Lofland's February 15 letter.

Lofland testified that the information regarding the pension funds was needed to determine whether the Employer would press its demands for a different pension plan. Harrigan testified that he told Zachary to notify Lofland that the information was available from the administrator. Harrigan as a trustee of the Retail Clerks Pension Trust has access to and is provided information from the trust administrator at each trustee meeting outlining the financial condition of the Trust. While the trustees have apparently delegated certain responsibilities to the administrator of the funds, there is no contention that the information requested by the Employer was not available to Harrigan as a trustee or as an official of a participating labor organization. It was stipulated that Harrigan is not a trustee of the Meat Industry Pension Trust, although he is a trustee of the other three funds provided for in the agreements. According to Harrigan, the administrator normally charges a $40 fee to employers who request the calculation of their withdrawal liability.

C. *Analysis and Conclusions*

1. The refusal to meet and bargain

Section 8(b)(3) of the Act provides: "It shall be an unfair labor practice for a labor organization or its agents—(3) to refuse to bargain collectively with an employer, provided it is the representative of its employees subject to the Provisions of Section 9(a)." Section 8(b)(3) must be read in conjunction with Section 8(d):

> For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession . . . .

As noted by the Supreme Court, it was the intent of Congress when enacting Section 8(b)(3) to condemn in union agents those bargaining attitudes "that had been condemned in management" by the previously enacted Section 8(a)(5). *NLRB v. Insurance Agents*, 361 U.S. 477, 487 (1960).

As can be readily seen, the Respondent refused to meet and confer with the Employer from March until July 1981, when the dismissal of the Respondent's unfair

labor practice charge was upheld. The Respondent's position that the Employer had adopted the contract is not supported by the evidence. Rather, the uncontradicted testimony of Layman shows that she consistently informed Fields and Harrigan that she would not agree to the Allied Agreements and that she wished to negotiate terms by which she could "live." The Respondent's mistaken belief that the Employer had adopted the contracts cannot privilege its failure to meet its obligations under Section 8(d).[3] Finally, I find Respondent's subsequent willingness to meet with the Employer during August does not dissipate the unfair labor practices nor does it make unnecessary a remedial order.

2. The refusal to furnish information

It is well established that a union's duty to bargain in good faith by furnishing requested information to an employer for the purpose of collective bargaining is commensurate with the similar duty imposed by the Act upon employers. *Teamsters Local 959 (Frontier Transportation Co.)*, 244 NLRB 19 (1979); *Tool & Die Makers Local 78 (Square D Co.)*, 224 NLRB 111 (1976); *Printing & Graphic Communications Local 13 (Oakland Press)*, 223 NLRB 994 (1977), enfd. 598 F.2d 267 (D.C. Cir. 1979).

There can be no doubt the information requested concerning the pension funds was relevant to the Employer's determination of what position to take during bargaining with regard to the funds. The Respondent does not contend that the Employer was not entitled to the requested information. Rather, the Respondent contends that the requested information was equally available to the Employer on request from the administrator of the funds.

In *Hospital Employees (Sinai Hospital)*, 248 NLRB 631 (1980), the Board held that a union has an affirmative obligation to make reasonable efforts to obtain information, relevant and necessary for collective-bargaining purpose, to investigate reasonable alternative means for obtaining such information, or to truthfully explain or document the reasons for the unavailability of the information. In that case the Board ordered a union to take the affirmative action of formally requesting from a joint trust fund certain contribution-related information which the fund had refused to furnish the employer.

The Respondent argues that the holding in *Sinai Hospital* does not mandate a finding of a violation herein because "Respondent made no effort to prevent the Employer from getting the information" but simply referred the Employer to the trust administrator. However, I find that argument unconvincing. Inherent in the approach taken by Harrigan was a delay in providing the information to the Employer. Harrigan's conduct throughout the bargaining dispute shows no attempt to reach agreement with the Employer. Under such circumstances, his cavalier approach to the Employer's request for information is consistent with his prior refusal to meet and confer. It is not unreasonable to expect, consistent with the affirmative obligation announced in *Sinai Hospital*, that the Respondent take steps to facilitate compliance with the Employer's request so that the parties can get to real bargaining. It is highly suspicious, but consistent with Harrigan's approach herein, that the administrator provided the Employer with the requested information just days prior to the instant trial. Based on the above facts and principles of law, I find that in not affirmatively requesting the Employer with the requested relevant information, the Respondent violated its duty to bargain under Section 8(b)(3) as interpreted by the Board in its *Sinai Hospital* decision.

The Respondent's defense that the requested information is equally available to the Employer is rejected. The Respondent proposed the inclusion of the trust funds in its proposed bargaining agreements. Further, the Respondent is party to collective-bargaining agreements with approximately 200 employers, which agreements provide for contributions to the subject trust funds. Harrigan, the Respondent's president, is a trustee of three of the four funds under the direction of the administrator. Representatives of affiliated unions also act as trustees of the funds. The Employer, on the other hand, has no official who is a trustee nor is it affiliated with any multiemployer group which has a representative the funds as the union trustees. As stated in *Frontier Transportation*, supra, "It would be clearly inequitable to permit 'informed' bargaining to occur between only respondent and employer-trustees, while employers who do not happen to be trustees and therefore would have no access to admittedly relevant information must bargain from a position of total ignorance." 244 NLRB at 22.

Moreover, the Respondent made no effort to obtain the information and, thus, is in no position to argue that its request would be treated no differently from that of the Employer. The Board in *Sinai Hospital*, without reaching agency issues, decided that it would be naive, as a practical matter, to assume that the union trustees could not have obtained the requested information had they so desired. Under all of the circumstances of this case, it would be naive to assume that the requested information would not have been expeditiously provided, had Harrigan desired to facilitate the bargaining process.

Finally, with regard to the calculation of the Employer's withdrawal liability from the Retail Clerks Pension Trust Fund, it is not inconsistent with the Employer's right to receive the relevant information from the fund to require the Employer to tender a reasonable fee, uniformly required of all employers seeking such information, for administrative costs.[4] Thus, it appears that the Respondent's duty to request such information from the fund is conditioned on the Employer's tender of the usual fee.

[3] In his post-trial brief, counsel for the General Counsel alleges for the first time that during negotiations prior to March 1981, the Respondent violated Sec. 8(b)(3) by bargaining with a "take it or leave it" attitude. As this allegation was not included in the complaint and was not addressed by the Respondent at trial or in brief, I find that the matter was not fairly and fully litigated. Thus, I make no finding regarding this contention. See *Camay Drilling Co.*, 254 NLRB 239, 240 fn. 9 (1981).

[4] Cf. *American Telephone & Telegraph Co.*, 250 NLRB 47 fn. 2 (1980), enfd. 644 F.2d 923 (1st Cir. 1981).

CONCLUSIONS OF LAW

1. The Respondent, United Food and Commercial Workers Union Local 1439, chartered by United Food and Commercial Workers International Union, AFL–CIO, CLC, is a labor organization within the meaning of Section 2(5) of the Act.

2. The Employer, Layman's Inc., d/b/a Layman's Market, is an employer within the meaning of Section 2(2) of the Act, and is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

3. The following units are appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

(a) The meat department unit:

All journeymen meat cutters, meat wrappers and apprentice meat cutters, excluding guards and supervisory employees within the meaning of Section 2(11) of the Act.

(b) The grocery department unit:

All employees of Layman's Market handling or selling merchandise, excluding meat department employees, guards, and supervisory employees within the meaning of Section 2(11) of the Act.

4. At all times material, the Respondent has been the exclusive collective- bargaining representative of the employees in each of the above-described units within the meaning of Section 9(a) of the Act.

5. By refusing to meet and confer with the Employer concerning succeeding bargaining agreements during the period from March to July 1981, and by failing to make reasonable efforts to obtain for and provide to the Employer the requested information pertaining to the trust funds, the Respondent violated Section 8(b)(3) of the Act.

6. The unfair labor practices of the Respondent as described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and that it take certain affirmative action to effectuate the policies of the Act.

In order to remedy the Respondent's unfair labor practices and in an attempt to get the parties back to the bargaining table, I will recommend that on the Employer's tender of the uniform fee the Respondent be required to request from the Retail Clerks Pension Fund, in writing, the calculation of the Employer's withdrawal liability. Further, in order to prevent the Employer from being required to bargain without the information to which it is entitled, I shall recommend that, if the Employer tenders the customary fee, the Employer shall not be required, if it so desires, to bargain with the Respondent with respect to its Fund contributions until such time as the Employer is provided with the requested information. See *Sinai Hospital*, supra at 634–635.

In its post-trial brief, the Employer requests that it be awarded attorneys' fees pursuant to *Tiidee Products*, 194 NLRB 1234 (1972). Under *Tiidee Products*, the Board may order the payment of certain extraordinary remedies, such as attorneys' fees, if it determines that a party has engaged in frivolous litigation. However, the Board has strictly construed the term "frivolous litigation" so as not to unduly penalize a party for pursuing its rights and to only award attorneys' fees in extraordinary cases. I note that neither *Sinai Hospital* nor *Frontier Transportation* was reviewed by a United States Court of Appeals. The only way Respondent may seek judicial review of the principles set forth in those cases is to litigate the instant case. Thus, I cannot conclude that the present case constitutes frivolous litigation as that term has been construed historically.

On the foregoing findings of fact and conclusions of law and on the entire record, I issue the following recommended

ORDER[5]

The Respondent, United Food and Commercial Workers Union Local 1439, chartered by United Food and Commercial Workers International Union, AFL–CIO, CLC, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Failing and refusing to meet and confer with representatives of Layman's Inc., d/b/a Layman's Market, for purposes of negotiating succeeding collective-bargaining agreements, both in the meat and grocery department units described in Conclusion of Law 3.

(b) Refusing to make reasonable efforts to obtain for and provide to the Employer information relevant to the trust funds provided for in its proposed collective-bargaining agreements.

(c) In any like or related manner refusing to bargain collectively with the Employer.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act.

(a) Request, in writing, from the Retail Clerks Pension Trust Fund the requested information relevant to the Employer's withdrawal liability pursuant to the manner and subject to the provisions set forth in the section of this Decision entitled "The Remedy."

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Post at its offices and meeting halls copies of the attached notice marked "Appendix."[6] Copies of said notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days thereafter in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(c) Furnish signed copies of said notice to the Regional Director for Region 19 for posting by Layman's Inc., d/b/a Layman's Market, said Employer being willing, at all locations where notices to its employees are customarily posted.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[6] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."